

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

1022 CALHOUN STREET (SUITE 302)

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
ELIZABETH ZECK*
PAIGE J. GOSSETT
RANDOLPH R. LOWELL
K. CHAD BURGESS
NOAH M. HICKS II**
M. McMULLEN TAYLOR

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

July 20, 2005

*ALSO ADMITTED IN TX
**ALSO ADMITTED IN VA

VIA U.S. MAIL

The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: Coastal Electric Cooperative, Inc. vs. South Carolina Electric & Gas
Company, Docket No. 2005-154-E

Dear Mr. Terreni:

Enclosed for filing please find the original and twelve (12) copies of the Memorandum of SCE&G in Support of Its Motion to Dismiss in the above captioned matter. Please accept the original and ten (10) copies for filing and return (2) copies, bearing your file stamp, in the envelope provided. By copy of this letter I am serving counsel of record and enclose a Certificate of Service to that effect.

If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Randolph R. Lowell

RRL/jmb
enclosures

cc: The Honorable C. Dukes Scott
Florence P. Belser, Esquire
Marcus A. Manos, Esquire
James B. Richardson, Jr., Esquire
Patricia Banks Morrison, Esquire

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2005-154-E

Coastal Electric Cooperative, Inc.,)	
)	
Complainant,)	
)	
-vs-)	SCE&G'S MEMORANDUM
)	IN SUPPORT OF ITS
South Carolina Electric & Gas Company,)	MOTION TO DISMISS
)	
Respondent.)	
_____)	

Coastal Electric Cooperative, Inc. ("Coastal") filed a Complaint asking the Commission to declare that Coastal has the legal right to supply electricity to a Wal-Mart store under construction in the City of Walterboro. South Carolina Electric & Gas Company ("SCE&G") moved to dismiss the Complaint for lack of subject matter jurisdiction and/or because another action is pending between the same parties for the same claim. SCE&G submits this memorandum in support of its motion.

FACTS

A new Wal-Mart store is under construction at a site located entirely within the municipal limits of the City of Walterboro. The new Wal-Mart lies in territory assigned to SCE&G before the site was annexed by the City.¹ Coastal seeks to provide electric service to the new Wal-Mart. On April 28, 2005, SCE&G filed Case No. 05-CP-15-292 in the Court of Common Pleas for

Colleton County seeking a declaration that Coastal has no legal right to serve the Wal-Mart. Coastal responded by filing a Complaint before the Commission seeking a declaration that it does have such a right.

ARGUMENTS

The Commission should dismiss Coastal's Complaint for several reasons. First, the Commission lacks jurisdiction to adjudicate this dispute. As a threshold matter, in the Electric Cooperatives Act of 2004, effective February 19, 2004,² the General Assembly clearly and unambiguously conferred upon the Court of Common Pleas, not the Public Service Commission, the authority to determine whether an electric cooperative has the corporate power to serve a customer located inside a municipality. This provision of the Act preserved the same feature of previous legislation. Further, none of the other statutes conferring jurisdiction upon the Commission authorize the Commission to determine whether an electric cooperative has the legal right to serve a particular customer located *inside a municipality*.

Second, in accordance with the governing statute, an action has already been commenced and is now pending between Coastal and SCE&G in the Court of Common Pleas for Colleton County to determine whether Coastal has the right to serve this customer. Accordingly, even if the Commission were to decide that it has jurisdiction over this dispute, the Commission should nevertheless dismiss Coastal's Complaint under Rule 12(b)(8), SCRCP.

¹ The Walterboro Wal-Mart lies wholly within an area assigned to SCE&G. The parcel of land on which the Wal-Mart is to be constructed was annexed on September 29, 2004.

² The Electric Cooperative Act, S.C. Acts No. 179 (2004), is codified in various sections of the S.C. Code Annotated in Title 33, Chapter 49 and Title 58, Chapter 27.

I. The Commission lacks jurisdiction to adjudicate this dispute.

- A. The General Assembly has conferred upon the Court of Common Pleas, not the Commission, the authority to determine whether a cooperative has the corporate power to supply electricity to a customer inside a municipality.

An electric cooperative's authority to supply electricity to a customer located wholly within a municipality is determined by the provisions of the Electric Cooperative Act of 2004. The cooperative's authority is a matter of *corporate law*, and, specifically, *corporation powers*. Section 33-49-250 of the Code is entitled "**Powers of cooperative.**" That statute defines and limits the right of a cooperative to supply electricity inside city limits. In fact, Coastal specifically relies upon section 33-49-250 as its purported authority to serve the new Wal-Mart. (Compl. ¶¶ 4, 7, 10.) The statutory language directly addresses the present issue of jurisdiction over a dispute and is dispositive. Subsection one of that statute provides:

In the event of a violation of the provisions of this subsection, the municipality or any affected board of public works or commission of public works or any affected supplier of electricity may institute an action in the court of common pleas of the county in which the violation occurs to compel compliance with the provisions of this subsection. . . .

S.C. Code Ann. 33-49-250(1) (Supp. 2004) (emphasis added). This language is unambiguous and governs the instant case.

The 2004 legislation not only modified the authority of cooperatives to supply electricity inside municipalities, it also modified and reconfirmed this grant of jurisdiction to the Court of Common Pleas to determine whether a cooperative is exceeding its corporate power to serve.³ If

³ Some of the area surrounding the Wal-Mart was annexed prior to February 19, 2004. For those portions of land the Electric Cooperative Act of 2004 preserves the "Hamlet Rule" of former section 33-49-250. However, the parcel on which the Wal-Mart is going to be

the Legislature had intended for the Commission to exercise a similar jurisdiction, it would have conferred such jurisdiction expressly.

The General Assembly clearly expressed its legislative intent in granting jurisdiction to the Court of Common Pleas over this present issue. The Legislature could not have meant for the courts and the Commission to compete with one another in a race to judgment on the question of whether a cooperative has the right to serve a particular customer inside a municipality. See Kiriakides v. United Artists Communications, 312 S.C. 271, 440 S.E.2d 364, 366 (1994) (the courts will reject an interpretation of a statute that “would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.”). There is no basis to conclude that the Legislature by its silence meant to allow the Public Service Commission to exercise the same jurisdiction alongside, and in competition with, the expressly conferred jurisdiction of the Court of Common Pleas. See, e.g., Lindler v. Baker, 280 S.C. 130, 311 S.E.2d 99, 100 (Ct. App. 1984) (interpreting the jurisdiction in S.C. Code Ann. § 58-5-210, which provides the Commission with “power and jurisdiction to supervise and regulate the rates and service of every public utility in this State,” as granting the “Commission with the exclusive right to regulate utility rates.”).

constructed was annexed after February 19, 2004. For those areas annexed after February 19, 2004, cooperatives have exclusive service rights in areas which, before annexation, were assigned to them by the Commission under the Territorial Assignment Act, and investor-owned utilities have exclusive service rights in areas previously assigned to them. The new Wal-Mart lies wholly within an area assigned to SCE&G.

- B. Neither the Territorial Assignment Act⁴ nor any other statute confers jurisdiction upon the Commission to decide whether a cooperative has the power, under the Electric Cooperative Act of 2004, to supply electricity to a customer inside a municipality.

It is a fundamental principle of administrative law that agencies have no powers other than those granted to them by the General Assembly. See Kiawah Property Owners Group v. Public Serv. Comm'n of South Carolina, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) ("The PSC is a government agency of limited power and jurisdiction, which is conferred either expressly or impliedly by the General Assembly."); City of Camden v. Public Serv. Comm'n of S.C., 283 S.C. 380, 382, 323 S.E.2d 519, 521 (1984) ("The Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are conferred upon it either expressly or by reasonably necessary implication by the General Assembly."). As discussed above, the Electric Cooperative Act of 2004 confers jurisdiction upon the *Court of Common Pleas* to determine whether a cooperative has the power to supply electricity to a particular customer inside a municipality. S.C. Code Ann. § 33-49-250(1). No other statute exists which could be read to confer similar jurisdiction upon the Commission.

1. *The Territorial Assignment Act does not apply inside municipalities.*

The Territorial Assignment Act defines the service rights of electric suppliers "[w]ith respect to service in all areas *outside the corporate limits of municipalities*. . . ." S.C. Code Ann. § 58-27-620 (1976) (emphasis added). After defining service rights outside municipal limits, the Act provides that "[n]o electric supplier shall furnish electric service to any premises in this State *outside the limits of any incorporated city or town* except as permitted by this section. . . ." S.C. Code Ann. § 58-27-620(4) (1976) (emphasis added). The parcel at issue is *inside* the limits

⁴ S.C. Code Ann. §§ 58-27-610 et seq.

of the City of Walterboro, and thus *outside* the scope of the Territorial Assignment Act. Therefore, by its own clear and unambiguous terms, the Territorial Assignment Act is inapplicable to the case at hand.

In the Electric Cooperative Act of 2004, the General Assembly changed and settled the right of cooperatives to supply electricity inside municipal limits. It is the Electric Cooperative Act of 2004, and not the Territorial Assignment Act, that governs the authority of a cooperative to supply electricity to a particular customer inside municipal limits. This has been the case since cooperatives were first authorized by law in 1939, decades before the Territorial Assignment Act was passed.⁵

Nothing in the Electric Cooperative Act gives the Commission any jurisdiction to determine questions of any kind which may arise under that Act, including service rights questions. The corporate powers of electric cooperatives cover a broad range of topics. See S.C. Code Ann. § 33-49-250. These topics include a cooperative's power to lend and borrow money, to exercise eminent domain, and to purchase stock in other cooperatives, among other subjects. No one would suggest that the Commission has implied jurisdiction under the Electric Cooperative Act to decide challenges to a cooperative's corporate power to condemn land, for example. Jurisdiction to decide issues relating to the corporate powers of cooperatives rests exclusively in the Court of Common Pleas. This is true of all questions arising under section 33-49-250, including service rights within municipalities.

⁵ While pre-annexation assignments made under the Territorial Assignment Act must be considered in determining whether a cooperative has the power to serve premises in an annexed area pursuant to the 2004 Electric Cooperative Act, it is the Electric Cooperative Act, not the Territorial Assignment Act, which governs the cooperative's right to serve inside a municipality.

2. *No other statute gives the Commission jurisdiction to decide whether a cooperative has the legal right to serve a customer inside a municipality.*

The Commission's authority to regulate the electric business is found in Title 58, Chapter 27 of the Code. However, by statute, cooperatives are largely exempt from the Commission's jurisdiction. Specifically, the statute states:

Exemption from control of Public Service Commission.

Cooperatives . . . transacting business in this State pursuant to this chapter, except for the provisions of §§ 58-27-40, 58-27-610 through 58-27-670, 58-27-820, 58-27-840, 58-27-1210, 58-27-1270, 58-27-1280 and 58-27-210, shall be exempt from the jurisdiction and control of the Public Service Commission of South Carolina.

S.C. Code Ann. § 33-49-50 (Rev. 1990). None of the exceptions apply here.⁶ Thus, cooperatives are exempt from the jurisdiction of the Commission — except in connection with statutes which do not apply here.

The cooperative is likewise exempt from the coverage of section 58-27-220, relating to the Commission's enforcement and administration of the laws found in Title 58, Chapter 27. This section applies by its own terms only to "electrical utilities." The term "electrical utilities" is defined in section 58-27-10 and specifically excludes electric cooperatives. Hence, no statute

⁶ See S.C. Code Ann. § 58-27-40 (requiring cooperatives and electrical utilities to obey Commission orders); S.C. Code Ann. §§ 58-27-610 to -670 (the Territorial Assignment Act, discussed *supra*); S.C. Code Ann. § 58-27-820 (requiring cooperatives to file their rate schedules with the Commission as information only); S.C. Code Ann. § 58-27-840 (forbidding unreasonable rate preferences or discrimination); S.C. Code Ann. § 58-27-1210 (relating to facility extensions and the duty to serve in assigned areas); S.C. Code Ann. § 58-27-1270 (authorizing the Commission to grant a cease-and-desist order when a cooperative is operating in violation of Chapter 27 of Title 58); S.C. Code Ann. § 58-27-1280 (relating to remedying unreasonable interference from the construction or extension of facilities); S.C. Code Ann. § 58-27-210 (requiring the Commission to prosecute a court action to stop a cooperative from doing or failing to do "anything required of it by law or by order of the Commission. . .").

grants jurisdiction to the Commission to determine whether a cooperative has the corporate power under section 33-49-250 to serve a particular customer within a municipality.

II. Even if the Commission were to determine that it had jurisdiction over this dispute, it should dismiss the Complaint because another action is already pending in court between these same parties on the same issue.

Where a prior action is pending between the same parties for the same relief, a court of law has no authority to accept jurisdiction of a second action which duplicates the first one. See Rule 12(b)(8), SCRCP; Connecticut Nat'l Bank v. Wilson, 284 S.C. 415, 326 S.E.2d 657, 658 (1985) (stating that an order of abatement is proper “where there is an identity of parties, causes of action, issues and relief”); McConnell v. Williams, 252 S.C. 573, 167 S.E.2d 429 (1969) (affirming the decision of the trial court abating a second suit until the first-filed suit had been terminated). While Coastal has filed an action with the Commission rather than filing a second action in court, Rule 12(b)(8) nonetheless applies.⁷ Coastal presents to the Commission the *identical issue* under the *identical cause of action* between the *same parties*⁸ already pending before the Court of Common Pleas of Colleton County.

Even if the Commission were to rule on this issue, such a decision would be subject to judicial review. See South Carolina Life and Accident and Health Ins. Guaranty Ass'n v. Liberty Life Ins. Co., 331 S.C. 268, 500 S.E.2d 193, 198 (Ct. App. 1998) (“Although an administrative agency’s interpretation of a statute is entitled to deference, it is not controlling when such deference would be inappropriate.”), citing Monroe v. Livingston, 251 S.C. 214, 161 S.E.2d 243

⁷ While the Rules of Civil Procedure do not specifically apply in Commission proceedings, it has been the Commission’s practice to look to those Rules for guidance and adopt them where they are not inconsistent with Commission regulations, practice, or procedure.

⁸ Also a named defendant in the circuit court matter is Wal-Mart, as its electric service is the subject of the dispute.

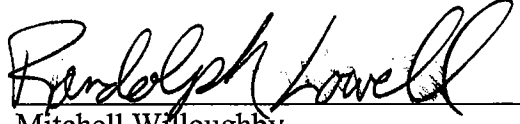
(1963) (an administrative interpretation should not be the basis for the perpetuation of an erroneous application of a statute). The conservation of resources and economy and efficiency support the Commission's dismissal of this matter to allow the circuit court to address this issue in the first instance and resolve the statutory interpretation issue at hand.

CONCLUSION

The language of the governing statute is clear and unambiguous. The General Assembly, through section 33-49-250, clearly conferred jurisdiction of this controversy on the Court of Common Pleas. Further, cooperatives are exempt from Commission jurisdiction except in regard to specified statutes. None of those statutes confers jurisdiction to decide whether Coastal has authority under the Electric Cooperatives Act of 2004 to serve the customer in question inside the city limits of Walterboro. Indeed, in accordance with the express provisions of the applicable statute and before Coastal filed its Complaint in this matter, SCE&G had filed an action in the Court of Common Pleas for Colleton County to determine whether Coastal has the legal right and power under Section 33-49-250 of the Electric Cooperatives Act of 2004 to serve the new Wal-Mart in Walterboro.

For these reasons set forth, SCE&G respectfully urges the Commission to dismiss Coastal Electric Cooperative's Complaint.

Respectfully submitted,



Mitchell Willoughby

Paige J. Gossett

Randolph R. Lowell

Willoughby & Hoefer, PA

Post Office Box 8416

Columbia, South Carolina 29202-8416

(803) 252-3300

mwilloughby@willoughbyhoefer.com

pgossett@willoughbyhoefer.com

rlowell@willoughbyhoefer.com

James B. Richardson, Jr.

1229 Lincoln Street

Columbia, South Carolina 29201

(803) 799-9412

jbrcolumbia@aol.com

Patricia Banks Morrison

South Carolina Electric & Gas Company

1426 Main St., Legal Dep't 130

Columbia, South Carolina 29218

(803) 217-9356

pmorrison@scana.com

Attorneys for Respondent.

Columbia, South Carolina
This 20th day of July, 2005.

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-154-E

IN RE:)
)
Coastal Electric Cooperative, Inc.,)
)
Complainant,)
)
vs.)
)
South Carolina Electric & Gas Company,)
)
Respondent.)
_____)

CERTIFICATE OF SERVICE

This is to certify that I, an employee of the law firm of Willoughby & Hoefer, P.A., on behalf of South Carolina Electric & Gas Company, have served or caused to be served this day one copy of the **MEMORANDUM OF SCE&G IN SUPPORT OF ITS MOTION TO DISMISS** upon the persons named below, at the addresses set forth, by the means indicated:

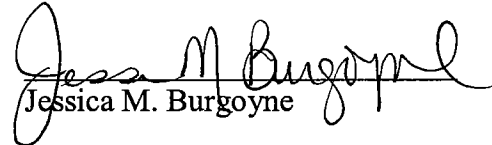
VIA U.S. MAIL

The Honorable C. Dukes Scott
Executive Director
Office of Regulatory Staff
Post Office Box 11263
Columbia, SC 29211

Florence P. Belser, Esquire
General Counsel
Office of Regulatory Staff
Post Office Box 11263
Columbia, SC 29211

VIA U.S. MAIL

Marcus A. Manos, Esquire
Nexsen Pruet Adams Kleemeier, LLC
Post Office Drawer 2426
Columbia, SC 29202


Jessica M. Burgoyne

July 20, 2005
Columbia, South Carolina